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Supreme Court of the United States

OCTOBER TERM 1940

No. 740

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of JAMES J. CARPENTER, deceased,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE LINK, JR.,
Attorney for Petitioner,
Office and P. O. Address,
17 John Street,
New York, N. Y.

GEORGE LINK, JR.,
CHARLES H. BUCKLEY,
of Counsel.

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The respondent in its brief states that the first reason why this Court should deny the petition herein is that the petitioner defaulted in the Court below and has no standing to apply for the writ herein sought.

This action was originally brought by the plaintiff against Julia C. Gelfert and George U. Hammond, as Executors of the Last Will and Testament of James J. Carpenter, deceased (R. 2). The estate of James J. Carpenter was therefore the party against whom the proceeding was brought, and the individuals were named solely in their representative capacities as executors.

The Appellate Division in reversing the lower Court modified the judgment by striking out the deficiency judgment against the Estate of James J. Carpenter (R. 30). This reversal by the Appellate Division did not maintain or make effective any personal judgment against Julia C. Gelfert as one of the executors of the estate of James J. Carpenter, deceased, or against said estate (R. 30).

The remittitur of the Court of Appeals of the State of New York reinstated the entire judgment (R. 38), and the order of the Supreme Court of the State of New York, Kings County, making the order of the Court of Appeals the order of said Supreme Court, Kings County, reinstated the deficiency judgment against Julia C. Gelfert, and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, deceased (R. 39).

Thereafter the said Julia C. Gelfert as sole surviving executor of the Last Will and Testament of James J. Carpenter, deceased, secured an order from said Supreme Court, Kings County, amending the title of the action to properly reflect the death of said George U. Hammond, one of the said executors of said estate (R. 40-41).

Upon the death of said George U. Hammond, all of the rights, powers and privileges of the estate of James J. Carpenter, were thereupon vested in the said sole surviving executor, Julia C. Gelfert, who is the petitioner herein.

Section 93, of the New York Surrogate's Court Act provides: "Where one of two or more executors or administrators dies * * * a successor to the person who dies * * * shall not be appointed except where such an appointment is necessary in order to comply with the express terms of a Will; but the others may proceed and complete the administration of the estate pursuant to the letters, *and may continue any action or special proceeding brought by or against all.*" (Italics ours.)

The foregoing section of the New York Surrogate's Court Act specifically vested all right and title to continue the present proceeding in the sole surviving executor, Julia C. Gelfert, the petitioner herein. This was confirmed by the order of said Kings County Supreme Court (R. 40-41). The respondent cannot collaterally attack petitioner's standing or the said order of the Kings County Supreme Court.

It is therefore respectfully submitted that the first objection made by the respondent is not sustained, and that

the estate of James J. Carpenter is properly before this Court on this application through said Estate's sole surviving executor.

On page 9 of respondent's brief it is indicated that petitioner invokes the jurisdiction of this Court on the ground that the present case is in conflict with *Honeyman* v. *Jacobs,* 306 U. S. 539.

On page 4 of our petition it is stated that one of the reasons for granting the writ herein is that the present decision is contrary to *Richmond Loan and Mortgage Corporation* v. *Wachovia Bank & Trust Company,* 300 U. S. 124.

It is therefore respectfully submitted that the relief requested for in the petition be granted.

GEORGE LINK, JR.,
Attorney for Petitioner,
Office and P. O. Address,
17 John Street,
New York, N. Y.

GEORGE LINK, JR.,
CHARLES H. BUCKLEY,
of Counsel.